SUPREME COURT U. S.

FILED

JUL 19 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 260

MARTHA A. HORNBEAK, for herself and all others similarly situated,
Appellant,

vs.

PHILLIP HAMM, Commissioner of Revenue for the State of Alabama, and his successors in office,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

MACDONALD GALLION
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Counsel for Appellee

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the decree of the District Court dismissing this case be affirmed on the ground that the question is so unsubstantial as not to warrant further argument or in the alternative that the appeal in this cause be dismissed on the ground that there is no basis for Federal Jurisdiction.

OPINION BELOW

This is a direct appeal from an order and decree entered on April 10, 1968, by a District Court of three judges specially constituted pursuant to 28 USCA 2281 dismissing appellant's complaint which sought to acquire uniform assessment of property throughout the State of Alabama for ad valorem tax purposes. The opinion of the United States District Court for the Middle District of Alabama is appended to appellant's Jurisdictional Statement and is now reported in 283 F. Supp. 548.

The majority opinion of the District Court concluded that this case is not within 28 USCA 1343(3), the Civil Rights Jurisdictional statute, and "hence no basis for Federal jurisdiction is shown to exist and the case must be dismissed." The Court cited *Bussie v. Long*, 283 F. 2d 766 and the authorities cited therein as the basis for its decision that the complaint alleges only a "property right" and not a "civil right" under section 1343(3), supra.

STATEMENT OF THE CASE

Appellant brought this suit on her own behalf and on behalf of all other citizens and taxpayers in the State of Alabama who are similarly situated. Made defendants (appellee here) in this suit are Phillip Hamm, Commissioner of Revenue for the State of Alabama and his successors in office. Appellant alleged nonfeasance on the part of defendant (appellee) and his predecessors in office in failing to comply with their statutory duties under the provisions of Title 51, sections 131 and 133, Code of Alabama 1940, and in violation of section 211, Constitution of Alabama 1901 and the Fourteenth Amendment of the Constitution of the United States, and that defendant (appellee) and his successors in office, unless prevented by

this Court, will continue such nonfeasance. Appellant alleged that such action has resulted in vast disparity and inequality in the assessment of property taxes throughout the State of Alabama and that she and other taxpayers similarly situated are being deprived of property without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, and in violation of section 211, Constitution of Alabama 1901. Appellant also alleged that Act No. 502, Acts of Alabama 1967, which provides that "All taxable property within this state shall be assessed for the purpose of taxation not to exceed thirty percent of its fair and reasonable market value" is void and violates section 211, Constitution of Alabama 1901 and the Fourteenth Amendment of the Constitution of the United States.

Appellant sought a hearing before a three-judge district court under 28 USCA, section 2281 and prayed in substance, that the Court declare:

1. That Act No. 502, Acts of Alabama 1967, is vague, indefinite and uncertain and in violation of section 211, Constitution of Alabama 1901 and the Fourteenth Amendment of the Constitution of the United States.

2. That the defendant (appellee) and his predecessors in office have and the defendant (appellee) and his successors in office would hereafter deprive appellant and all other taxpayers similarly situated of the equal protection of the law and of property without due process of law by failing, refusing or neglecting to perform the duties of commissioner of revenue as prescribed in sections 131 and 133 of Title 51, Code of Alabama 1940 and by failing, refusing or neglecting to levy ad valorem taxes on property in exact proportion to the value of such property as required by section 211, Constitution of Alabama 1901.

3. That appellant and all other citizens and taxpayers similarly situated do not have a plain, speedy and efficient remedy in the state courts of Alabama.

4. That defendant (appellee) and his successors in office be enjoined from failing, refusing and neglecting to perform his statutory duties and be compelled to require that each county assess all real estate within the county for ad valorem taxation in exact proportion to the value thereof at thirty percent of reasonable and fair market value.

Federal jurisdiction was asserted under 42 USCA, sections 1983 and 1988 and 28 USCA, section 1343(3) on the basis that the defendant (appellee) was depriving appellant of her rights under the equal protection and due process clauses of the Fourteenth Amendment. The complaint contained no allegations that any specific monetary sum was involved nor was there any other suggestion of jurisdictional amount. The complaint alleged that the plaintiff had no plain, speedy and efficient remedy in the state courts of Alabama.

Defendant (appellee) filed a Motion to Dismiss based primarily on the following grounds: that the complaint fails to state a claim upon which relief can be granted; that the claim here asserted does not fall within the purview of the so-called civil rights statutes, 42 USCA, sections 1983 and 1988 and 28 USCA, section 1343(3); that plaintiff (appellant) has not presented a federal question since a plain, speedy and efficient remedy may be had in the state courts of Alabama; lack of jurisdiction of the subject matter; lack of jurisdictional amount. In support of said Motion, defendant (appellee) cited as conclusive authority the case of *Bussie v. Long*, 254 F. Supp. 797, affirmed by the Fifth Circuit Court of Appeals, August 22, 1967 in *Bussie, et al v. Long, et al*, 283 F. 2d 766, and

the cases cited in both opinions. The case was dismissed on April 10, 1968.

ARGUMENT

Appellee can add nothing to what the District Court in this case stated in its opinion rendered on April 10, 1968 nor to what the Fifth Circuit Court of Appeals stated in its opinion rendered in the *Bussie* case, supra. Appellee stands on these decisions and the authorities cited therein for its position that the decision of the District Court is plainly correct.

Appellant stated on page 8 of her Jurisdictional Statement that "The primary issue involved in this appeal has never been decided by the United States Supreme Court . . ." Apparently, the Fifth Circuit Court of Appeals in the *Bussie* case, supra, takes the position that the United States Supreme Court has decided the issue; that is, that a suit involving only a "property or monetary right" does not involve a "civil right" within the purview of section 1343(3), supra, citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 20 S. Ct. 272, 44 L. Ed. 374; *Abernathy v. Carpenter*, 208 F. Supp. 793 (three-judge court) affirmed Mem. 373 U. S. 241, 83 S. Ct. 1295, 10 L. Ed. 2d 409. To the same effect is the Seventh Circuit Court of Appeals in the case of *Gray v. Morgan*, 371 F. 2d 172 (1966).

Although not material to a decision of the issue before the Court at this stage of this proceeding, the appellant has made some reference on page 5 of her Jurisdictional Statement to her allegation on page 14 of the complaint that she was without a plain, speedy and efficient remedy in the state courts of Alabama. It is respectfully submitted that the cases cited by appellant on page 5 of her Jurisdictional Statement do not

stand for the proposition for which they are cited. The *Chilton County* case, 142 So. 531, merely holds that a county may not maintain such an action as was attempted in that case; in the *Foshee* case, 142 So. 533, relator alleged no discrimination or injury to himself or other taxpayers, only an official duty to the state in its sovereign capacity; and the case of *Morrison v. Morris*, 141 So. 2d 169, involved an action by a member of the Jefferson County Board of Equalization against the chairman of said board to void notification set by the board to certain taxpayers that changes had been made in assessment of their property. To appellee's knowledge, no case of the type under consideration here has ever been submitted to a state court in Alabama. Therefore, there has been no affirmative showing that there is no plain, speedy and efficient remedy available to the appellant in the state courts of Alabama.

CONCLUSION

It is respectfully submitted, therefore, that the appellant presents no substantial question for decision of this Court and that the judgment and decision of the District Court should be affirmed or in the alternative the appeal in this case should be dismissed on the ground that there is no basis for Federal jurisdiction.

Respectfully submitted,

MACDONALD GALLION
Attorney General of Alabama

WILLARD W. LIVINGSTON, Counsel,
Department of Revenue and Assistant
Attorney General of Alabama

HERBERT I. BURSON, Assistant Counsel,
Department of Revenue and Assistant
Attorney General of Alabama

CERTIFICATE OF SERVICE

I hereby certify that I have on this _____ day of _____, 1968, served a copy of the foregoing Motion to Dismiss or Affirm upon the Honorable Barry Hess, 919 Dauphin Street, Mobile, Alabama 36604, attorney of record for the appellant in this case, by mailing same, properly addressed, first class postage prepaid to his offices in Mobile, Alabama.

_____

WILLARD W. LIVINGSTON
Of Counsel for Appellee